

# ANDERSON & KREIGER LLP

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JEFFREY L. ROELOFS  
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November 14, 2005

**By Hand at November 14 Prehearing Conference**

Waste Management Council  
Attn: Mr. Michael Sclafani, Appeals Clerk  
c/o DES Legal Unit  
29 Hazen Drive  
P.O. Box 95  
Concord, NH 03302-0095

**RECEIVED**

**NOV 14 2005**

Re: In re Regenesis Corporation  
WMC Nos: 05-09-WMC, 05-10-WMC, and 05-11-WMC (consolidated appeals)

Dear Mr. Sclafani:

I enclose for filing in the above-referenced consolidated matters an original and 20 copies of "CFNH's Statement of Issues and Proposed Process/Schedule."

Thank you.

Sincerely,  
**COPY**  
Jeffrey L. Roelofs

Enclosure

cc: Edward A. Haffer, Esq. (by hand at prehearing conference)  
Jennifer J. Patterson, Esq. (by hand at prehearing conference)  
Barry Needleman, Esq. (by hand at prehearing conference)  
John E. Friberg, Jr., Esq. (by hand at prehearing conference)  
Ronald J. Lajoie, Esq. (by hand at prehearing conference)

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THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WASTE MANAGEMENT COUNCIL

	)	
	)	WMC NO.: 05-09-WMC
REGENESIS CORPORATION	)	05-10-WMC
1994 Maple Street	)	05-11-WMC
West Hopkinton, NH 03229	)	
	)	APPEAL OF LICENSE
	)	REVOCATION
Re: Solid Waste Permit No. DES-SW-SP-002	)	
Regenesis Corporation	)	DES DOCKET NO. 04-010
West Hopkinton	)	

**CFNH'S STATEMENT OF ISSUES AND  
PROPOSED PROCESS/SCHEDULE**

Citizens for a Future New Hampshire ("CFNH"), by its Attorneys, Anderson & Kreiger, LLP, submits this Statement of Issues and Proposed Process/Schedule for consideration at the pre-hearing conference on November 14, 2005.

**Background**

On November 22, 2004, the New Hampshire Department of Environmental Services ("DES") issued a Notice of Proposed License Action, No. 04-010, proposing to revoke Bio Energy/Regenesis' Solid Waste Permit No. DES-SW-SP-02-002 (the "Permit"). On February 17, 2005, Presiding Officer Walls issued an order defining the scope of issues under that notice. On March 4, 2005, the DES issued an Amended Notice of Proposed License Action ("ANLPA"), expanding the allegations and scope of the original notice.

On June 23, 2005, after conducting an administrative hearing, Presiding Officer Walls issued a "Decision on Proposed Revocation of Solid Waste Permit" (the

“Decision”), revoking the Permit. On July 25, 2005, Regenesis and Intervenor CFNH and Residents Environmental Action Committee for Health (“REACH”) filed appeals of the Decision with the Waste Management Council (the “Council”).

**Issues Raised in Regenesis’ Appeal:**

Overarching Issue: The overarching issue raised in Regenesis’ appeal is whether the Council should affirm, based on the applicable standard of review, Presiding Officer Walls’ Decision to revoke the Permit – based either on (1) the grounds/findings stated by Presiding Officer Walls or (2) other grounds established by the record and within the scope of the ANPLA as properly construed.<sup>1</sup>

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<sup>1</sup> As discussed in CFNH’s Notice of Appeal, Presiding Officer Walls erred in adopting Bio Energy’s narrow interpretation of the ANPLA as referring only to the failure to disclose DiNapoli’s conviction or Bio Energy Corp.’s dissolution and erred in rendering evidentiary rulings based on that interpretation. For example, at ¶¶ 10-19, the ANPLA begins with a discussion of the Respondent’s conduct in applying for the Solid Waste Permit ultimately issued on May 28, 2002 – going beyond merely the Type IV modification requested on December 2, 2002 (¶ 29), which the Respondent claimed was the focus of the original notice. The ANPLA alleges (¶¶ 11- 36, 41-47) a pattern of misrepresentations, omissions and misleading statements in the course of applying for both the Solid Waste Permit and Type IV Modification.

The following provisions of the ANPLA are particularly relevant to the reliability and integrity issues:

- III.39. Criteria for permit denial include the applicant's failure to demonstrate sufficient reliability, expertise, integrity, and competence to operate a solid waste facility, per RSA 149-M:9, IX(a).
- III.47. The fact that Regenesis officials supplied DES with false or misleading information, as alleged more specifically in paragraphs 1-46 above, calls into question whether the company has sufficient reliability and integrity to operate a solid waste facility.
- IV.2. Regenesis officials' false or misleading statements to DES in the course of the permit proceedings call into question whether Regenesis has the reliability and integrity to operate a solid waste facility.
- V.1. Under the circumstances, the permittee cannot correct the underlying problem. Therefore, DES proposes to revoke the Permit.

Sub-Issues: The above-stated overarching issue involves numerous sub-issues.<sup>2</sup>

For example, Presiding Officer Walls made numerous findings and conclusions in support of his revocation decision, including but not limited to the following:

1. Issuance of the 2002 Permit and the subsequent Type IV and Type IA Modifications was based on false information (Decision, p. 90, ¶ 1(a)), including but not limited to:
  - a. false compliance certifications (Decision, pp. 69-70, 90); and
  - b. false information as to the identities of the entities that owned and operated the facility and that held the Solid Waste Permit, and the corporate status of those entities (Decision, pp. 48-49, 55, 60-61, ¶¶ 28, 42 and 55).
2. Issuance of the 2002 Permit and the subsequent Type IV and Type IA Modifications was based on misleading and incomplete information (Decision, p. 90, ¶ 1(a)), including but not limited to:
  - a. misleading and incomplete compliance certifications (Decision, pp. 69-70 – “The certification was not complete, it was less than candid, and it was literally false”); and
  - b. misleading and otherwise incomplete information as to the identities of the entities that owned and operated the facility and that held the Solid Waste Permit, and the corporate status of those entities, including but not limited

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<sup>2</sup> In its Appeal, Regensis has sought reversal of the entire Decision, except for two discrete findings: (1) Presiding Officer Walls’ finding on the reliability and integrity issue (Regensis’ Notice of Appeal, p. 1), and (2) Presiding Officer Walls’ finding on adequacy of notice (Regensis’ Notice of Appeal, p. 2). Regensis has also specifically sought to vacate all findings and rulings that it characterizes as “unnecessary to the determination of” what it characterizes as the three “alleged violations” in the ANPLA (Regensis’ Notice of Appeal, pp. 6-7, fn. 1-2), which raises, for example, issues concerning the scope of the ANPLA.

to the failure to disclose in the 2002 transfer application that Bio Energy Corporation had been dissolved (Decision, pp. 70 to 71 – “The transfer application was incomplete and misleading with respect to important and material information – the current corporate existence of the permittee, Bio Energy Corporation and an explanation how its responsibilities under the permit had been extinguished without approval by DES).<sup>3</sup>

3. Issuance of the 2002 Permit and the subsequent Type IV and Type IA Modifications was based on false, misleading and or otherwise incomplete information – when considered in context – for example, as found by Walls, “Regenesiis and Bio Energy LLC [and] their officials – namely Messrs. DiNapoli, Dell’Orfano and Smith – violated solid waste laws and regulations in the course of and in connection with the solid waste permit applications” (Decision, p. 91, ¶ 1(c)), by, among other things, failing to obtain timely approval for modifications to the solid waste permit in connection with Bio Energy Corporation’s dissolution and conveyance of the facility to Bio Energy LLC (Decision, pp. 70-71).

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<sup>3</sup> Further examples: Nowhere on the 2002 Transfer Application, and at no point during the application process, did Bio Energy or Regenesiis officials inform the DES solid waste program that Bio Energy LLC was and would continue to be the owner and operator of the Facility, that Mr. DiNapoli had resigned from Bio Energy Corp, that Bio Energy Corp. had been dissolved, that all other environmental permits associated with the Facility were held by the LLC, or that Regenesiis was not licensed to conduct business in New Hampshire until January 21, 2003. Nor did they disclose that Mr. DiNapoli had been convicted of a felony, was a member of the LLC, held 50% of the LLC’s debt or equity, stood to profit from the Facility’s operations in direct relation to Regenesiis’ profits and retained significant authority over the Facility operations, including matters of environmental compliance. Decision, pp. 57-58, ¶¶ 45-50.

**Issues Raised in CFNH's and REACH's Appeals:**

Based on the applicable standard of review:

1. Whether Presiding Officer Walls should have found that Regenesys' officials lack sufficient reliability and integrity to operate a solid waste facility, pursuant to RSA 149-M:9, IX(a) – constituting an additional, independent ground for revocation of the Permit pursuant to Env-Wm 306.05(c) with preclusive effect upon future applications, based on (1) the evidence presented in the underlying proceedings, or (2) if more is needed, on additional relevant evidence that Presiding Officer Walls erroneously precluded the discovery of or presentation of through various erroneous evidentiary rulings;
2. Whether Presiding Officer Walls should have found that Bio Energy and/or Regenesys failed to provide proper public notice pursuant to Env-Wm 303.05(d) in connection with their solid waste permit applications when they sent notices to corporate affiliates and not to abutters to such corporate affiliates.

**PROPOSED PROCESS/SCHEDULE**

To facilitate an orderly and expeditious process before the Waste Management Council, CFNH proposes as follows:

**Administrative Record**

CFNH proposes that the entire administrative record from the underlying revocation proceedings be transferred to and incorporated into the administrative record before the Waste Management Council.

## Schedule

CFNH proposes the following schedule:

December 20	Deadline to submit briefs concerning definition of appeal issues.
January 12	Hearing related to appeal issues.
January 31	Deadline to submit appeal briefs and any associated exhibits.
February 28	Appeal arguments.

This is an aggressive schedule given, among other factors, (1) the voluminous administrative record, (2) the complexity and importance of these appeals, (3) the number of Council members that will need to review the record, briefs and other materials submitted in connection with these appeals, and (4) the upcoming holidays in November and December, which will render it difficult for Council members, party representatives and members of the public to devote significant time to these proceedings over the next several weeks.

Respectfully submitted,

Citizens for a Future New Hampshire,  
By its attorneys

**COPY**

Jeffrey L. Roelofs, Esq. (NH Bar #16015)  
ANDERSON & KREIGER LLP  
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Cambridge, MA 02141  
(617) 252-6575

Date: November 11, 2005

**CERTIFICATION**

I hereby certify that a copy of the foregoing has on this 14th day of November, 2005 been provided, by hand at the pre-hearing conference, to counsel for each of the parties hereto.

**COPY**  
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Dorey L. Brooks

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